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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

HENRY F. and ANNE MARIE FRIGON, Plaintiffs, v. PACIFIC INDEMNITY COMPANY, a Wisconsin corporation, Defendant.	)	No. 05 C 6214 Judge Robert W. Gettleman

MEMORANDUM OPINION AND ORDER

Plaintiffs Henry and Anne Marie Frigon have brought a two count complaint against their insurer, Pacific Indemnity Co., seeking a declaration that certain valuable works of art have been lost or converted and are thus covered under the terms of an insurance policy issued by defendant (Count I), and for breach of that contract (Count II). Plaintiffs have moved for summary judgment on Count I, and for judgment of liability on Count II. seeking a declaration that a loss by conversion or fraud is a covered loss under the policy. Defendant has filed a cross motion, seeking summary judgment on both counts. For the reasons set forth below, plaintiffs' motion is granted in part. Defendant's motion is denied.

FACTS

Despite the excessive amount of paper filed by the parties, the facts of this suit are simple. The Frigons are connoisseurs of fine art and have bought and sold fine art for a number of years. At the heart of this case are eleven paintings owned by the Frigons and insured by defendant under a "Masterpiece Policy". The Policy covered "all risk of physical loss to valuable articles [including the eleven paintings] unless stated otherwise or an exclusion applies." (Emphasis in original).

The Frigons purchased the eleven paintings from R.H. Love Galleries in Chicago (the "Gallery"). They had formed a close business and personal relationship with Richard H. Love, who tutored Henry Frigon in art history, appreciation, collecting and investment. As a result of that relationship, the Frigons purchased most of their collection of Early American Impressionist art from the Gallery, including the eleven paintings at issue. Periodically, the Frigons would place a painting back with the Gallery for resale under a consignment agreement. Between 1997 and 2002 each of the eleven paintings at issue were placed with the Gallery for sale on consignment pursuant to either a written form consignment agreement provided by the Gallery, or an oral agreement between plaintiffs and the Gallery. Plaintiffs have paid over $1 million for the eleven paintings, which have been consigned for a minimum sale price aggregating $1,600,000.

Unbeknownst to plaintiffs, the Gallery was insolvent and had been for years. According to plaintiffs, to stay afloat the Gallery had begun selling consigned items for less than the minimum agreed price and keeping the proceeds rather than remitting them to the consignors. Among those items "unlawfully" sold by the Gallery were plaintiffs' eleven paintings. By the end of 2002, each of the eleven paintings were disposed of by the Gallery contrary to the terms of the consignment agreement through trades and/or sales for less than the minimum prices. Plaintiffs were not informed of these "sales" and received no payments from the Gallery. Finally, in January 2003, Richard Love told plaintiffs that the highest priced painting, which had been consigned for a minimum sale price of $300,000 in mid-November 2002, had been sold, but did not reveal the details of the sale. In a letter, Love stated that the paintings had been sold on an installment basis with plaintiffs to receive twelve equal installments payments of $36,250 for

a total of $435,000. In fact, the painting had been "sold" for a one-time cash payment of $150,000 and a trade for another painting. At the time that Love wrote to plaintiffs, the Gallery had already deposited the $150,000 into its own bank account.

Plaintiffs received two installment payments of $36,250. In the Spring of 2003, after the payments stopped, Henry Frigon became concerned and demanded that all his paintings be returned. When they were not returned, on April 8, 2003, Richard Love admitted that all the paintings had been sold, and that the Gallery had spent the proceeds and could not pay plaintiffs the minimum sales price.

On May 2, 2003, plaintiffs made a loss report to defendant. Defendant has denied coverage. Attempts have been made to recover the paintings. Plaintiffs located four at Madron Gallery, another art gallery located in Chicago. Madron is run by Bruce Bachman, Love's former assistant at the Gallery. Plaintiffs have sued Madron and, as a result, have recovered one painting, Childe Hassan's Sunset, Little Hills, in a partial settlement. Another painting remains the subject of litigation to clear title.

DISCUSSION

The Policy at issue is an "All-Risk" policy which, as the parties agree, means that it covers all causes of physical loss of the insured property, unless specifically excluded. There is no dispute that the paintings at issue are all covered under the Policy and that plaintiffs are no longer in possession of ten of the paintings. There is some dispute as to the actual minimum sales price of certain of the paintings, but that dispute is irrelevant to defendant's argument that plaintiffs' loss is not covered under the Policy.

Plaintiffs, as the insureds, have the initial burden of showing the existence of a covered loss. The burden then shifts to the insurer to show an exception to coverage. Harbor House Condominiums Association v. Massachusetts Bay Insurance Co., 915 F.2d 316 (7th Cir. 1990).

Defendant argues initially that plaintiffs cannot establish a covered loss. Specifically, defendant argues that plaintiffs can establish only that the paintings were sold on consignment and that the Gallery has not remitted payment to plaintiffs. Thus, according defendant, all that plaintiffs establish is a business debt which is not covered by the Policy. Defendant argues that plaintiff admits that all of the paintings "were sold under the Consignment Agreements entered with Love Galleries," and that they are simply disappointed in the (zero) return on their investment.

This rather simplistic argument falters on many levels, the most obvious of which is that plaintiffs do not in any way admit that the paintings were sold "under the Consignment Agreements." In fact, plaintiffs allege, and it appears to be undisputed, that each and every painting was sold in violation of the terms of the applicable Consignment Agreement. Moreover, it is also undisputed that little, if any of the proceeds from the "sales" went to plaintiffs. According to the undisputed facts, the Gallery simply took the paintings, sold them or traded them for whatever it could get and kept the proceeds, not revealing to plaintiffs that the paintings were gone.

In Metalexpert Co. v. Gen-O-Ral Processing Corp., 365 F.2d 178, 180 (7th Cir. 1966), the court held that when the consignee sold the consigned item and failed to turn over the proceeds, his rightful possession became a wrongful conversion. In Metalexpert, the consignee was authorized to sell the item and, thus, converted the funds received. In the instant case, the

Gallery sold the paintings without authority and then failed to remit the proceeds, thereby converting both the paintings and the money received. See E.G. Knight v. Seney, 290 Ill. 11 (1919) (unauthorized sale of a bailed item is a conversion.). As defendant admits, in Illinois a conversion is "any unauthorized act, which deprives a man of his property permanently or for an indefinite time." Union Stock Yard & Transit Co. v. Malloy Son & Zimmerman Co., 157 Ill. 554, 563 (1895).

There can be no doubt that the Gallery's unauthorized sales deprived plaintiffs of their property. Indeed, defendant argues repeatedly that the paintings were sold by the Gallery to bona fide purchasers. As far as plaintiffs are concerned at this point in time, the conduct of the Gallery toward their paintings is no different than had the Gallery taken the paintings on consignment and destroyed them. The fact that the Gallery may owe plaintiffs the value of the lost paintings is no more significant than the fact that a thief would owe the victim of his theft the value of the stolen property. Accordingly, the court concludes that plaintiffs have met their burden of showing a covered loss, and defendant has failed to meet its burden of showing an exception to coverage. Consequently, for purposes of this insurance coverage dispute, the court finds that the loss of the paintings is covered by the Masterpiece Policy..

Finally, defendant also argues that because the Gallery was plaintiffs' agent when it converted the paintings, plaintiffs "put the Galleries' in motion" by entering the consignment agreements. Thus, defendant argues for application of the exclusion for loss occurring as a result of an intentional act by the insured, which provides:

> We do not cover any loss caused intentionally by you or a family member, or by a person directed by you or a family member to cause a loss. An intentional act is one whose consequences could have been foreseen by a reasonable person.

According to defendant, plaintiffs cannot claim a loss for an intentional act by the Gallery taken pursuant to the consignment agreement. Of course, the Gallery's actions were not taken pursuant to the consignment agreement but in contravention of it. Therefore, the exclusion does not apply. Additionally, no reasonable person could foresee the Gallery converting the paintings for its own profit. Accordingly, the court concludes that the loss of the paintings sustained by the plaintiffs as a result of the Gallery's conduct is covered by the Policy. Partial summary judgment is granted to plaintiffs on Count I, declaring that the loss of the paintings is covered by the Policy. Plaintiffs' motion for partial summary judgment is granted in part. Because the extent of the loss is still in dispute, the court cannot determine anything further. Summary judgment is denied in all other respects. Defendant's motion for summary judgment is also denied.

CONCLUSION

For the reasons set forth above, the court grants in part plaintiffs' motion for summary judgment, and declares that plaintiffs' loss is covered by the Policy. Defendant's motion for summary judgment is denied.[1]

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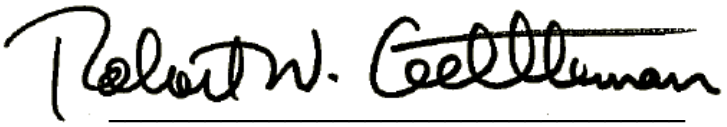

Robert W. Gettleman
United States District Judge

[1]Defendant has asked permission to file a motion to strike certain portions of Henry Frigon's affidavit filed in support of plaintiffs' motion, arguing that it contains unsupported statements of fact. Although the affidavit does contain a number of legal conclusions, hearsay and unsupported statements, only his statements as to the alleged minimum sales prices and his understanding of the terms of the consignment agreements are relevant to the instant motions. Because the court disregards the inadmissible portions of Frigon's affidavit, defendant's motion for leave to file a motion to strike is denied. Significantly, nowhere in any of defendant's copious papers has it asserted that the handwritten minimum prices added to the form agreements are not the actual agreed upon prices, and defendant submitted the same agreements with the same prices in support of its motion and argued that they represent the actual contracts in question. Nor has defendant ever argued that the Gallery sold any of the paintings for the agreed price.